No. 10413

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

ARLEY VIRGLE TUDOR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

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REPLY BRIEF OF APPELLANT

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Reply to brief of appellee herein will follow appellee's statements as to questions presented which is as follows:

QUESTIONS PRESENTED

1. Whether the indictment is defective.

2. Whether the Court erred in the admission of certain evidence.

3. Whether the Court erred in permitting testimony of a certain Government witness.

4. Whether the Court erred in instructing the jury.

ASSIGNMENT OF ERROR NO. I

This assignment has to do with the sufficiency of the indictment. Appellee claims that every essential element of the offense has been set forth in the indictment. It has been heretofore called to the attention of the Court that the aforesaid indictment does not at any place state that Maricopa County local board No. 6 of the Selective Service system located in Glendale, Arizona, had jurisdiction over the defendant herein. Nor is it shown under the said indictment that the said Selective Service Board followed the laws, rules and regulations and orders of the Selective Service and Training Act of 1940 and Amendments thereto. It is the contention of the defendant that the jurisdiction of the board and its adherence to the law under which it acted is a necessary part of the indictment to show that an offense was committed.

ASSIGNMENT OF ERROR NO. II

This assignment has to do with the appellant's objections to the admission in evidence of the Government's Exhibit No. 2. Section 605.1 of the Selective Service Manual provides for the administration of oaths and the way in which such oaths shall be administered. The questionnaire form itself provides that the form shall be under oath. The rules and regulations promulgated under the Selective Service and Traniing Act of 1940, were very clearly not followed by the Selective Service Board in that case. This in itself as regards to questionnaire would be of little import except that irregularity in the proceedings of the Board are shown to exist in the very inception of this particular case which tendency of the Board colored the entire proceeding had in connection with the defendant herein.

The Selective Service and Training Act of 1940, provides under Section 303 (g) as follows:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

Here it is shown that the Selective Service Board was advised of the defendant's status as a conscientious objector which they chose to entirely ignore in direct contravention to the provisions of Section 303 (g) of the Selective Service and Training Act of 1940 as above set out. It is the contention of the defendant that any order of induction placing him in combatant service under such circumstances is invalid, unlawful and void.

ASSIGNMENT OF ERROR NO. III

This assignment refers to the testimony of Mr. Thomas Riordan as to what the rules and regulations of the Selective Service System were. On Page 10, Line 24 of the Reporter's Transcript begins the testimony of said Thomas Riordan which was in part as follows:

"At that time we had Rules and Regulations that came out that all men that were over 28 years of age

should be classified in 1-H, so when the registrant Tudor's file came up for reclassification, we found he was over 28 years of age. As I say, that was on September 30th, 1941, so he was placed in Class 1-H. Subsequent to the Declaration of War, we received new Rules and Regulations stating that all men—"

Exception was promptly taken protesting to the witness's testifying to what the Selective Service Rules and Regulations were. (R. T. 11)

The witness again testified as follows: (R. T. 12, Line 22)

"We received these new Regulations stating that all men classified in 1-H should be reclassified in Class 1, so—"

Objection was duly taken there at the time of such testimony and said objection overruled and exception taken whereupon the witness was allowed to proceed.

It is still the contention of this defendant that the Rules and Regulations themselves are the best evidence and that the objection to the testimony of Mr. Riordan as to what the Rules and Regulations were should be stricken. We call the attention of the Court that this was a trial before a jury and that the mere fact that the Court could take the judicial notice of what the Selective Service Training Act of 1940 and the amendments thereto and the Rules and Regulations in no wise changes the rules of evidence and that allowing such testimony as to what the Rules and Regulation were was an error on the part of the Court, and prejudicial to the appellant.

ASSIGNMENT OF ERROR NO. IV

This assignment refers to the instructions of the Court to the Jury. Appellant bases his objection to the instruction given on the fact that the Court in no wise gave cognizance or effect to 303 (g) of the Selective Service and Training Act of 1940, which provides as follows:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

But the Court's instruction was to the effect that the Board could arbitrarily and capriciously and without following the Selective Service and Training Act of 1940 and without a full and fair hearing make an order which the defendant was bound to obey despite the fact that the order of the Board was unlawful. During the course of the trial two things were shown and not contradicted that would definitely place the defendant in a class other than 1-A under the Selective Service and Training Act of 1940, namely:

1. Defendant was shown to be a conscientious objector and that the local Selective Service Board No.

6, Maricopa County, was notified thereof in the questionnaire of the defendant. (A. R. 23, A. R. 25)

2. It definitely proved that the defendant had dependents whom he was supporting which according to the Selective Service and Training Act of 1940, would placed him in deferred classification, namely, 3-A. It has been held by the Circuit Court of Appeals of the Ninth District as follows:

"It is no violation of Section 311 of the Act to fail to obey an order which the Board had no power to make."

Robert Earl Hopper vs. United States of Amercia, No. 10, 110 Dec. 18, 1942, Circuit Court of Appeals for the Ninth Circuit.

SUMMARY

The indictment was insufficient.

The Court erred in the reception and rejection of evidence.

The Court erred in denying the appellant's motion for a directed verdict.

The Court erred in instructing the jury.

Respectfully submitted,

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